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IN THE

Supreme Court of the United States

October Term, 1952

No. 222

HERTHA L. WOHLMUTH, *Petitioner*

v.

DEAN G. ACHESON, Secretary of State of the United States, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit and Brief in Support Thereof

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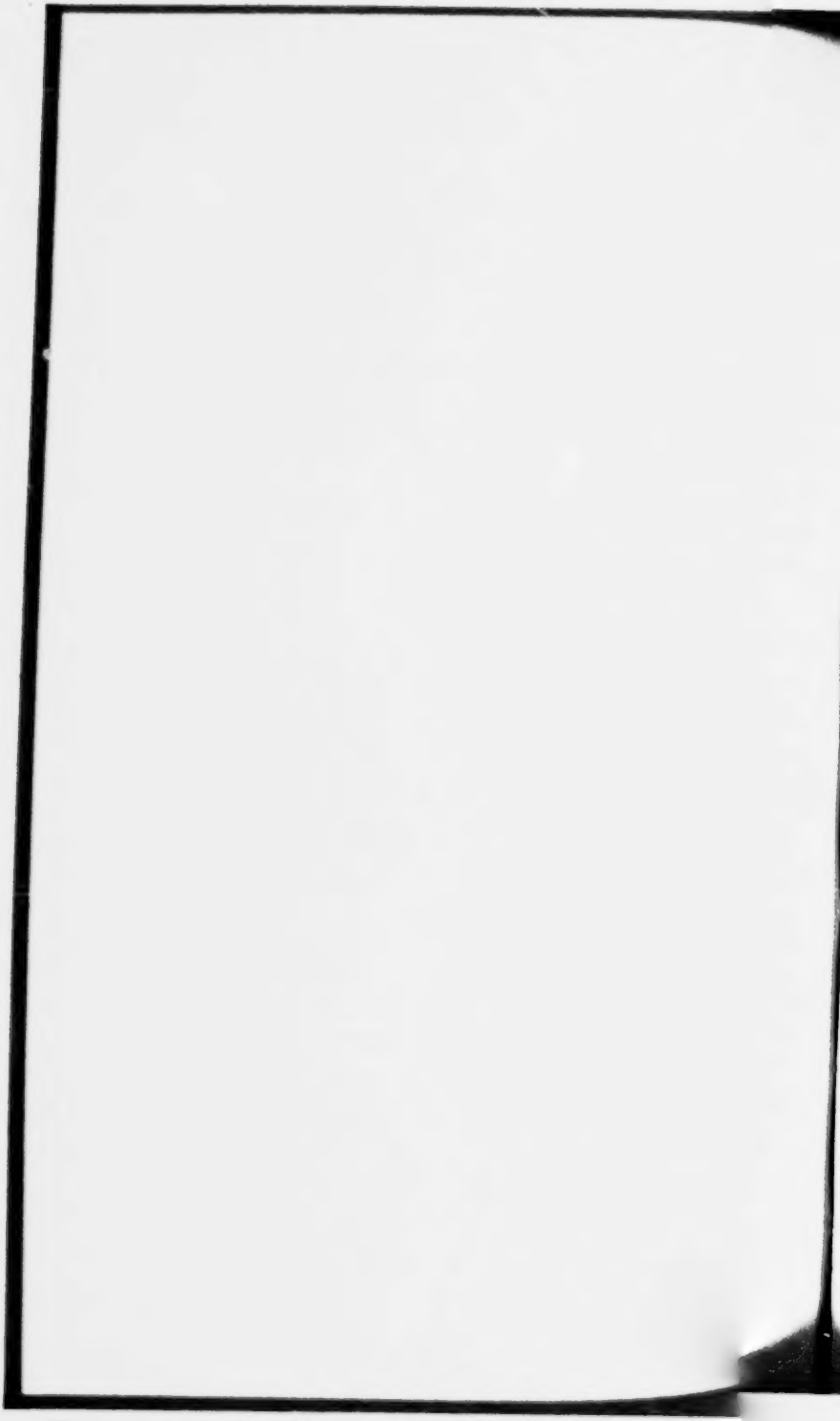

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DEAN G. ACHESON, Secretary of State of the United States, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Hertha L. Wohlmuth prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in No. 10917 entered on April 24, 1952 reversing the judgment of the United States District Court for the District of Columbia of November 10, 1950 which had held that petitioner was a citizen of the United States.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an action to establish United States citizenship brought under Section 503 of the Nationality Act of 1940 (54 Stat. 1171; 8 U.S.C. 903) in the United States District Court for the District of Columbia on February 2, 1950. (R. 3a). The government moved to dismiss on the ground that the Complaint failed to state a claim on which relief could be granted, and the case was heard on the pleadings. (R. 8a, 12a-13a). Subsequently, the District Court granted summary judgment for the plaintiff, petitioner herein, on November 10, 1950 without opinion. (R. 14a-15a). The defendant, respondent herein, appealed. (R. 15a). On April 24, 1952, the United States Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court and remanded the case to the District Court with leave to amend the complaint to allege and prove circumstances indicative of duress or entrapment. (R. 38, 39). The present petition for Writ of Certiorari followed.

The facts show that petitioner acquired United States citizenship under Section 1 of Amendment XIV to the Constitution by birth in New York City in 1893. (R. 3a). In 1926 she married a German doctor, thereby acquiring German citizenship under German law but retaining her United States citizenship by virtue of the Cable Act (Sec. 3, Act September 22, 1922, 42 Stat. 1021, 46 Stat. 1511, 8 U.S.C. 9). She lived with her husband in Germany during and after World War II. (R. 3a, 5a-6a).

At the commencement of World War II in Europe, the only ways petitioner could have lost her United States citizenship were by becoming naturalized in a foreign state on her own petition or by taking an oath of allegiance to a foreign state. On October 14, 1940 (after the War in Europe had commenced) Congress enacted

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the Nationality Act of 1940, incorporating in it provisions to the effect that the mere performance of certain acts which theretofore had had no effect on loss or retention of citizenship (including "voting in a political election in a foreign state"), should result in loss of United States citizenship. Petitioner was ignorant of that law. (R. 5a).

In 1945 after the Allied Forces had occupied Germany, petitioner informed three successive American Military Government officers at Fuerstenfeldbruck, Germany that she was an American citizen and asked what she should do. Each of the three officers advised her that there was nothing to do but to remain where she was. (R. 4a). No publicity had been given in Germany to the United States Nationality Act and petitioner was completely unaware of its existence or that voting had been made an act of expatriation. (R. 5a). None of the Military Government officers (nor anyone else) gave petitioner any information or warning about the new expatriation provisions of the Nationality Act of 1940.

On June 30, 1946 petitioner voted in an "election" to select delegates to a provincial constitutional assembly, held under the control of American Military Government officials in the United States zone of Occupied Germany. American Military Government officials had urged all eligible persons (particularly those opposed to Communism) to vote. Petitioner was eligible to vote because she possessed German, as well as United States nationality. (R. 5a, 12a).

In July, 1947 petitioner applied for a passport at the United States Consulate in Munich, United States zone of Germany. Final action was not taken on the application until approximately a year had passed. In June, 1948 petitioner's application was denied and a certificate of loss of U. S. citizenship issued on the ground that she

had lost her citizenship under section 401(e) of the Nationality Act of 1940 by casting a ballot in the "election" of June 30, 1946. There was no evidence that petitioner intended to abandon her United States allegiance and citizenship (R. 5a, 7a-8a).

Thereupon, petitioner obtained quota immigration visa No. 12426, issued at the American Consulate General a. Munich and proceeded to the United States where she instituted the present suit to determine her United States citizenship. (R. 6a).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on April 24, 1952. Upon motion made by present petitioner, the Court of Appeals has stayed its mandate to and including July 23, 1952.

QUESTIONS PRESENTED

The overlying question is:

1. *Most briefly stated;* whether a loyal native born American citizen can be involuntarily deprived of her American citizenship by virtual entrapment into the performing of an act which she had been led to believe was in the interest of the United States, which she never conceived could affect her citizenship status, and which never had been construed as affecting citizenship until declared by Congress in the Nationality Act of 1940 to constitute an act of expatriation.

2. *Stated to reflect the undisputed facts in this case;* whether a loyal native born American citizen who never had any intention or desire to expatriate herself or shift

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her allegiance, but on the contrary did everything she believed necessary to assert and retain her American citizenship and allegiance, can be involuntarily deprived of her American citizenship because, pursuant to the urging of officers of the American Occupying Forces, she performed an act which she believed to be in the interest of the United States, having no conceivable connection with loss or retention of citizenship and which, prior to the Nationality Act of 1940, never had been construed as effecting expatriation. Specifically, in such circumstances can voting by petitioner in the June 30, 1946 "election" conducted by the American Military Government in Occupied Germany impose involuntary loss of American citizenship on her when officers of the American Occupying Forces were urging all eligible persons opposed to Communism to vote, no publicity having been given to any of the provisions of the Nationality Act of 1940, and when this petitioner had absolutely no knowledge that Congress had made the novel provision in Section 401(e) of the Nationality Act of 1940 that one would lose American citizenship by "voting in a political election in a foreign state"?

Secondary questions are:

3. In the circumstances of this case was the act of petitioner in casting a ballot on June 30, 1946 her free and voluntary act within the meaning of the Nationality Act of 1940 as interpreted by the cases decided thereunder or was she, on the contrary, "because of misleading circumstances" deprived of the "opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law", that is, was she entrapped?

4. In the circumstances of this case was petitioner's act of voting a voluntary renunciation or abandonment of United States nationality or allegiance so as to result in expatriation?

5. If Section 401(e) of the Nationality Act of 1940 imposes expatriation in the circumstances of this case, is that section of the Act constitutional?

6. Was the "election" of June 30, 1946 in the United States zone of occupied Germany either an "election" or a "political election" within the meaning of Section 401(e) of the Nationality Act of 1940?

7. On June 30, 1946 was the United States zone of occupied Germany a "foreign state" within the meaning of Section 401(e) of the Nationality Act of 1940?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This Court should review the decision and judgment here in question pursuant to Rule 38 Sec. 5(c) of the Revised Rules of the Supreme Court of the United States because the United States Court of Appeals for the District of Columbia Circuit has decided questions of substance relating to the construction and application of a statute of the United States (namely Section 401(e) of the Nationality Act of 1940) which have not been, but should be, settled by this Court.

Congress has carried the exact language of Section 401(e) of the Nationality Act of 1940 into Section 349(a)(5) of the Immigration and Nationality Act of 1952; hence these questions will continue to arise until this Court settles them.

In the present state of the law, American citizens residing abroad who are ignorant of recent Congressional action relating to expatriation and who, without intending to give up American citizenship, have been trapped into committing an innocuous act which is unconnected with a shift of allegiance, but which has been declared by Congress to be an act of expatriation, may be de-

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ve action
prived of American citizenship by administrative a
of the State Department without a hearing.

e as acts
Moreover, the power of Congress to designate asion with
of expatriation certain acts having no connection t. Spe-
nationality should be examined by this Court. Congress
cifically, this Court should determine whether Con United
has the power under the Constitution of the U political
States to declare that the act of voting in a poli ve born
election in a foreign state shall deprive a native
American citizen of his citizenship.

PRAYER

Certiorari
WHEREFORE, petitioner prays that a Writ of Certi e United
issue under the seal of this Court, directed to the U Columbia
States Court of Appeals for the District of Colu send to
Circuit, commanding that Court to certify and sen e record
this Court a full and complete transcript of the r numbered
and of all proceedings before it in the case numl *G. Ache-*
and entitled on its docket Number 10,917, *Dean G. Appellant* v.
son, Secretary of State of the United States, Appella the case
Hertha L. Wohlmuth, Appellee, to the end that the t as pro-
may be reviewed and determined by this Court as
vided by law.

TH
HERTHA L. WOHLMUTH
Petitioner
R
By HENRY F. BUTLER *Petitioner*
Attorney for Petiti

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No.

HERTHA L. WOHLMUTH, *Petitioner*

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DEAN G. ACHESON, Secretary of State of the United States, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is printed in full in the record (R. 30-38) as is the opinion of the United States District Court for the District of Columbia denying the Government's motion to dismiss. (R. 12a-13a). Neither opinion has as yet been officially reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). The judgment of the United States Court of Appeals for the District of Columbia Circuit

was entered on April 24, 1952 and, upon motion of the present petitioner, the mandate of the Court of Appeals has been stayed to and including July 23, 1952.

STATEMENT OF THE CASE

The case has been stated concisely in the preceding petition under the heading Summary Statement of the Matter Involved. That statement is hereby adopted and made a part hereof.

SPECIFICATION OF ERRORS

The United States Court of Appeals for the District of Columbia Circuit erred:

1. In holding that the allegations of the Complaint are insufficient to support summary judgment on petitioner's theory that her voting was involuntary within the meaning of the Nationality Act of 1940 as interpreted by the cases decided thereunder; that is, that she was entrapped.

2. In failing to hold that petitioner's act of voting, even if it be considered voluntary, was not such a voluntary renunciation or abandonment of United States nationality or allegiance as to constitute an act of expatriation.

3. In holding that there is no foundation in the present record for petitioner's contention that under the circumstances of this case she could not constitutionally be deprived of her citizenship; that is, in refusing to consider petitioner's contention that section 401(e) of the Nationality Act of 1940 is unconstitutional if it imposes expatriation on the petitioner in the circumstances of this case *on the record as it now stands,* and without the necessity of amending the complaint.

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4. In holding that the "election" of June 30, 1946 in the United States zone of Occupied Germany was a "political election" within the meaning of Section 401(e) of the Nationality Act of 1940.

5. In holding that the United States zone of Occupied Germany was a "foreign state" on June 30, 1946 within the meaning of Section 401(e) of the Nationality Act of 1940.

STATUTE INVOLVED

Nationality Act of 1940

Section 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

* * * *

(e) Voting in a political election in a foreign state * * *

ARGUMENT

I.

Petitioner Did Not Knowingly and Intentionally Waive Her Rights to United States Citizenship, But Rather Was Trapped Into Voting in the June 30, 1946 "Election" and May Not Be Deprived of Her Citizenship on That Account.

Petitioner consulted three successive American Military Government officers at Fuerstenfeldbruck, Germany in 1945, informed each one that she was a United States citizen and asked what she should do. Each one replied to her that there was nothing to do but remain where she was. (R. 4a). No reference was made then or subsequently to the fact that the Nationality Act of 1940 had declared voting in a political election in a foreign state

to be an act of expatriation. (R. 5a). Prior to that Act, voting in a political election in a foreign state had no effect on loss or retention of United States citizenship.

In 1946 American Military Government officials gave wide publicity in the United States zone to the forthcoming "election" and urged all eligible persons (particularly those opposed to Communism) to vote. Petitioner yielded to that persuasion and cast her ballot in the June 30, 1946 "election" in complete ignorance of the existence of Section 401(e) of the Nationality Act of 1940. (R. 5a).

Having voted in the "election" at the urging of one group of United States government officials, petitioner was informed by another agency of the United States government that she had thereby lost her United States citizenship. These circumstances, without more, constitute a clear case of entrapment.

The Court of Appeals should have affirmed the decision of the District Court on the basis of *Moser* v. *U. S.*, 341 U. S. 41 (1951), which stated at page 47:

> "There is no need to evaluate these circumstances on the basis of any estoppel of the Government . . . Petitioner did not knowingly and intentionally waive his rights to citizenship. In fact, because of the misleading circumstances of this case, he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness. *Johnson* v. *United States*, 318 U. S. 189, 197. To hold otherwise would be to entrap petitioner."

In the instant case, petitioner did not knowingly and intentionally waive her rights to citizenship. On the contrary, she had no intention at the time of voting of giving

up her United States citizenship. Because of the misleading circumstances of her case, it is clear that she never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of this case, an "intelligent waiver" should be required by elementary fairness. There was no "intelligent waiver or election" on the part of petitioner.

For Congress to declare that loss of American citizenship will result from the mere performance of an act which in and of itself is no indication of abandonment or change of allegiance and which never theretofore had been construed as having any effect on one's citizenship status is to lay a trap for the unwary and the uninformed. This Court will not allow such pitfalls to cost loyal Americans their United States citizenship and thus deprive them of their most precious possession without warning or an opportunity to make an intelligent choice.

II.

Petitioner's Act of Voting in the June 30, 1946 "Election" Was Not a Voluntary Renunciation or Abandonment of United States Nationality or Allegiance and May Not Be Construed As An Act of Expatriation.

This Court has defined expatriation as the voluntary renunciation or abandonment of nationality and allegiance:

> "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking." *Perkins* v. *Elg*, 307 U. S. 325 at 334 (1939).

In this case, since petitioner did not know of the existence of Section 401(e) of the Nationality Act of 1940, which for the first time in our history declared voting abroad to be an act of expatriation, and since she voted only upon the urging of United States officials and without knowledge that voting could affect her United States citizenship, and without any intention of giving up her United States allegiance, it can equally well be said that "the voluntary action which is of the essence of the right of expatriation is lacking".

As Daniel Webster has said:

> "Change of allegiance, which is manifested by the voluntary action and usually by the oath of the party himself, ought always to be accomplished by proceedings which are understood on all sides to have that effect. It is certainly just that acts which are to be regarded as changing the allegiance of American citizens should be distinctly understood by those to whom they are applied as having that effect; that the practical as well as the theoretical construction of such acts should be unequivocal and uniform, and that no acts should be deemed acts of expatriation except such as are openly avowed and fully understood."

Daniel Webster, Secretary of State of the United States, to Mr. Sharkey, consul at Havana, July 5, 1852, Moore, III International Arbitrations 2701, 2703.

It is clear from the record in this case that petitioner did not understand her act of voting to have any connection with a change of allegiance and, further, that petitioner did not intend to renounce or abandon her United States allegiance and citizenship.

It must be concluded that petitioner may not be held to have lost her United States citizenship by the act of voting, whether or not such act be considered voluntary, since there was no voluntary renunciation or abandonment of citizenship.

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III.

Section 401 (e) of the Nationality Act of 1940 Is Unconstitutional If It Imposes Expatriation on Appellee in the Circumstances of This Case.

This Court has stated that

> "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away." *U. S.* v. *Wong Kim Ark*, 169 U. S. 649, 703 (1898).

The Court has also said in upholding the constitutionality of Section 3 of the Act of March 2, 1907 (34 Stat. 1228):

> "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into with notice of the consequences." *Mackenzie* v. *Hare*, 239 U. S. 299, 311 (1915).

In the instant case, the State Department, with the concurrence of the Court of Appeals, has arbitrarily imposed a change of citizenship upon the petitioner. Petitioner's voting was not done "with notice of the consequences."

If the interpretation of Section 401(e) of the Nationality Act of 1940 which has been urged upon, and accepted by, the Court of Appeals is the proper interpretation, then that section of the Act is clearly unconstitutional by the standards set by this Court in *Mackenzie* v. *Hare*, *supra*.

Savorgnan v. *U. S.*, 338 U. S. 491 (1950) is not to the contrary since that case involved loss of United States citizenship by an oath of allegiance to, and naturalization in, a foreign state, acts which have always indicated a shift of allegiance and which a person must be presumed to perform with "notice of the consequences."

IV.

The "Election" of June 30, 1946 in the United States Zone of Occupied Germany Was Not a "Political Election" Within the Meaning of Section 401 (e) of the Nationality Act of 1940.

The Nationality Act of 1940 does not define the phrase "political election" and this Court has not as yet handed down an opinion construing or interpreting those words, hence we must look elsewhere for enlightenment.

The Board of Immigration Appeals has ruled that an election must have "conclusive effect" in order to be considered as a "political election" within the meaning of Section 401(e):

> "We conclude that the performance in which the appellant took part * * * was in actuality a straw vote or opinion poll * * * and that, by reason of its lack of the essential element of conclusive effect, it was not 'a political election'". *Matter of H——*, 1 I. & N. Dec. 239, 244 (1942).

The Attorney General of the United States specifically approved the decision of the Board.

In the present case, the "election" of June 30, 1946 was a mere straw vote or opinion poll or exercise in democracy since it was only advisory as far as the Office of Military Government of the United States was concerned. Pursuant to its supreme authority in the United States zone of Occupied Germany, this country at all times had the power to alter the date of the election, to call off the election or to declare the results of the election null and void, and ultimately to approve, modify or disapprove any provincial constitution which the selected provincial delegates might agree upon.

Four District Courts, to petitioner's knowledge, have considered the matter of voting in "elections" in the

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United States zone of Occupied Germany and have unanimously agreed that such voting did not result in expatriation: *Brehm* v. *Acheson*, 90 F. Supp. 662 (S. D. Texas, 1950); *In re Riedner*, 94 F. Supp. 289 (E. D. Wis., 1950); the present case, *Wohlmuth* v. *Acheson*, Civil No. 520-50, U. S. District Court for the District of Columbia (1950), (reversed in the Court of Appeals); and *Droesse* v. *Acheson*, Civil No. 2783-49, U. S. District Court for the District of Columbia (1951). The judgment in the latter case was vacated upon the order of the United States Court of Appeals for the District of Columbia Circuit, when the case became moot pending appeal.

The Court below, insofar as petitioner is aware, is the only Court of Appeals which has passed on the question of voting in Occupied Germany and the only Court which has held such a German "election" to be a "political election" within the meaning of Section 401(e) of the Nationality Act of 1940. It is submitted that the decision below is in error.

V.

On June 30, 1946 the United States Zone of Occupied Germany Was Not a "Foreign State" Within the Meaning of Section 401(e) of the Nationality Act of 1940.

The Nationality Act of 1940 does not define the words "foreign state" nor has this Court had occasion to construe those words as they appear in Section 401(e) of the Act.

With the exception of the Court below, no court has held that the United States zone of Occupied Germany was a "foreign state" within the meaning of the Nationality Act. On the contrary, the United States District Courts for the Southern District of Texas, for the Eastern District of Wisconsin and for the District of Co-

lumbia concluded that the U. S. zone of Germany was not a "foreign state" and that consequently voting therein did not constitute expatriation. *Brehm* v. *Acheson*, 90 F. Supp. 662 (S. D. Texas, 1950); *In re Riedner*, 94 F. Supp. 289 (E. D. Wis., 1950); the present case, *Wohlmuth* v. *Acheson*, Civil No. 520-50, U. S. District Court for the District of Columbia (1950) (R. 12a-13a) (reversed in the Court of Appeals); and *Droesse* v. *Acheson*, Civil No. 2783-49, U. S. District Court for the District of Columbia (1951) (reversed on other grounds in the Court of Appeals).

The United States Government, itself, has announced that Germany ceased to exist as a state in 1945 following the unconditional surrender of the German armed forces and the assumption of supreme authority by the Allied Powers:

> "There is no central Government or authority in Germany capable of accepting responsibiilty for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers.
>
> • • • •
>
> "The Governments of the United States of America, The Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal or local government or authority . . ."
> (Declaration Regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers, June 5, 1945, 60 Stat. 1649, *Occupation of Germany*, Dept. State Pub. 2783, pp. 79-80, *Axis in Defeat*, Dept. State Pub. 2423, pp. 62 ff., R. 23a-24a).

In a pamphlet entitled *Occupation of Germany, Policy and Progress*, issued in August, 1947 by the State Department and given wide publicity, the State Department says at page 43:

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> "The Allied powers, having completely destroyed the Nazi state and assumed for the time sovereign authority in Germany, have been confronted with the necessity of formulating policies for the rebuilding of the entire German state structure." (R. 18a).

In view of the official pronouncement of the United States Government which was incorporated into the law of the land at 60 Stat. 1649 and in view of the statement of the State Department, the Government cannot now be heard to declare to the detriment of a United States citizen that Germany had never ceased to be, and was on June 30, 1946, a foreign state.

Such action on the part of the United States Government serves to reinforce petitioner's contention that she has been administratively deprived of her United States citizenship as the result of entrapment.

Since the German government and state were completely destroyed by the Allied Forces, whereas the Japanese Emperor and the Japanese state were not destroyed, but were rather specifically retained by the Allied Powers, the cases are inapplicable which hold that Occupied Japan was a "foreign state" within the meaning of the Nationality Act of 1940 and that voting in an "election" in Occupied Japan constituted an act of expatriation under Section 401(e) of the Act. *Acheson* v. *Kuniyuki*, 189 F. 2d 741 (C. A. 9, 1951), rehearing denied 190 F. 2d 897 (1951), cert. den. ..... U. S. ..... (1952), 72 S. Ct. 554; *Acheson* v. *Okimura*, 99 F. Supp. 587 (D. Hawaii, 1951), reversed and remanded ..... U. S. ..... (1952), 72 S. Ct. 293; *Acheson* v. *Murata*, 99 F. Supp. 591 (D. Hawaii, 1951), reversed and remanded ..... U. S. ..... (1952), 72 S. Ct. 294.

Whatever may have been the status of Germany on June 30, 1946 in the realm of international law, it was not a "foreign state" within the meaning of Section 401(e) of the Nationality Act of 1940.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari, should review the decision below and should settle the questions of the proper construction and constitutionality of Section 401(e) of the Nationality Act of 1940.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 222

HERTHA L. WOHLMUTH, PETITIONER

v.

DEAN G. ACHESON, SECRETARY OF STATE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 30-38) is not yet reported. The order of the District Court granting petitioner's motion for summary judgment appears at p. 14 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1952 (R. 39). A petition for certiorari was filed July 23, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was proper for the Court of Appeals to remand the cause to the District Court for proof of actual duress or entrapment, as against the petitioner's contention that her ignorance of the effect of voting in an election, coupled with statements of American officials in Germany urging eligible persons to vote, established entrapment as a matter of law.

2. Whether, within the meaning of Section 401 (e) of the Nationality Act of 1940, providing for loss of United States nationality by voting in a political election in a foreign state, the American zone of Germany was a foreign state in 1946.

3. Whether, within the meaning of Section 401 (e) of the Nationality Act of 1940, an election held in Germany under the auspices of American Military Government was a political election.

STATUTE INVOLVED

Section 401(e) of the Nationality Act of 1940, 54 Stat. 1137, 1168-1169, 8 U.S.C. 801(e) provides:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory * * *.

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STATEMENT

On February 2, 1950, in the United States District Court for the District of Columbia, petitioner filed a complaint under Section 503, Chapter V, of the Nationality Act of 1940, as amended, 8 U.S.C. 903, seeking a judgment declaring her to be a national of the United States. The pertinent facts as alleged in the complaint (R. 3-7) are as follows:

Petitioner (nee Hertha L. Wahl) was born in New York City in 1893. She lived with her parents in the United States from her birth until 1926, with the exception of brief summer vacation trips abroad. In October 1926, she married a German national in Munich, Germany, and thereafter lived in Germany with her husband. She stayed in Germany throughout World War II, and was there in 1945 when the American forces occupied Germany.

In 1946, American Military Government authorities and others announced that an election would be held to elect delegates from the American zone to consider and adopt a constitution for the establishment of a government for the American Zone of Germany. As a non-Nazi German national who had met the residence requirements, petitioner was eligible to vote. She makes no denial that, in fact, she actually voted in the election, which was held on June 30, 1946, but asserts that military government officials had urged that all those eligible to vote do so (particularly those opposed to Communism), and that she was unaware that voting in a foreign election had been made an act of expatriation by the Nationality Act of 1940.

In July 1947, petitioner made application for a United States passport which was denied on the grounds that she had expatriated herself by voting in the election of June 30, 1946. At that time she received a "Certificate of Expatriation." Petitioner subsequently obtained, on October 19, 1949, a "Temporary Travel Document in lieu of Passport for German nationals," valid until April 19, 1951. Upon arrival in the United States under this document, petitioner again took steps to assert her United States citizenship, but her claim was denied.

On May 18, 1950, the Government moved to dismiss this complaint on the ground that it failed to state any basis for relief (R. 8). On October 12, 1950, an order denying the Government's motion was entered (R. 13). Petitioner then made a motion for summary judgment which was granted (R. 14). On appeal by the Government, the Court of Appeals unanimously reversed the judgment of the District Court and remanded the cause for further proceedings consistent with its opinion. The District Court was instructed to permit petitioner to amend her complaint to develop if she can circumstances indicative of actual duress or entrapment. (R. 38.)

ARGUMENT

The judgment of the Court of Appeals is not a final judgment since petitioner was given an opportunity to amend her complaint and to allege and prove, if she can, actual duress or entrapment. Hence, at this stage of the proceedings, there is no

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necessity for a writ of certiorari to review the action of the Court of Appeals. *American Construction Co.* v. *Jacksonville, T. & K. W. Ry Co.*, 148 U.S. 372, 384; see Robertson & Kirkham, *Jurisdiction of the Supreme Court* (Wolfson & Kurland ed. 1951), Sec. 130, pp. 232-233.

It is clear, as the Court of Appeals held, that, unless she can show such actual duress and entrapment, the complaint presents no grounds for relief. Her claim that the facts as alleged in the pleadings and exhibits attached thereto are sufficient to establish that she never expatriated herself finds no support in the statute or the authorities.

The contentions which she makes in the setting of the German occupation are the same as those in the setting of the Japanese occupation which were rejected by the Court of Appeals for the Ninth Circuit in *Acheson* v. *Kuniyuki,* 189 F. 2d 741, certiorari denied, 342 U.S. 942.

1. Basically, her claim is that she did not know that, under the provisions of Section 401(e) of the Nationality Act, she would expatriate herself by voting in a foreign election. That is precisely the one consideration which, under the statute and decisions, is irrelevant. *Savorgnan* v. *United States,* 338 U.S. 491; *Mackenzie* v. *Hare,* 239 U.S. 299; *Acheson* v. *Kuniyuki, supra.*

The Nationality Act of 1940 enumerates overt acts, the voluntary performance of which results in loss of United States citizenship irrespective of the actor's awareness of their legal effect. In *Savor-*

gnan v. *United States*, 338 U.S. 491, this Court said, at pp. 499-500:[1]

> There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.

Her claim that statements of American Military Government officials urging all eligible persons to vote, coupled with her ignorance of the consequences of voting, were sufficient as a matter of law to establish entrapment, is clearly without merit. Petitioner does not contend that she was compelled to vote against her will; she does not claim that anyone told her, before she voted, that her voting would not affect her citizenship. Her reliance on *Moser* v. *United States*, 341 U.S. 41, is thus misplaced. That case involved different statutory provisions and a totally different factual situation in that there the government officials, as well as Moser, were unclear as to the effect a claim of exemption from military service would have on his eligibility for citizenship and, indeed, Moser had

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[1] Petitioner makes the further argument that if the statute is interpreted so as to deprive her of her nationality on the basis of acts done without "notice of the consequences," the statute is unconstitutional. Nowhere in the opinion of this Court in the *Savorgnan* case was there any intimation that the fixing of objective conditions for loss of nationality was beyond the constitutional power of Congress. This Court has recently reaffirmed the power of Congress to establish objective acts of expatriation. In *Acheson* v. *Okimura*, 342 U. S. 899, and *Acheson* v. *Murata*, 342 U. S. 900, it vacated judgments holding 401(c) and (e) unconstitutional on the theory that Congress could not destroy citizenship by birth solely on the basis of the performance of specific acts.

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been specifically advised, through the Swiss Co
sulate, that he could claim exemption without bei
debarred. The Court of Appeals has given pe
tioner an opportunity to prove actual duress
entrapment, if she can. There is no occasion
consider the question now.

2. Petitioner's contention that the United Sta
Zone of Occupied Germany is not a foreign st
within the meaning of the Nationality Act of 19
8 U.S.C. 801(e) is without merit. This Court h
held that countries occupied by United Sta
forces following a military victory continued to
"foreign," although United States domination a
control were at least as complete as they were w
respect to Germany following World War I
Neely v. *Henkel* (No. 1), 180 U.S. 109, 115-11
Fleming v. *Page*, 9 How. 603, 614. These decisi
rest on the well-established principle of interna
tional law that conquest and occupation alone
not effect the transfer of sovereignty. The v
torious power assumes authority required to ma
tain law and order, but the two states are
merged merely by the fact of military occupati
See Par. 273, Rules of Land Warfare of the W
Department of the United States, quoted in
Hackworth, *Digest of International Law*, § 5
p. 385 (1943); Hyde, *International Law*, Vol.

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[2] Thus this Court said with respect to one of the occupati
"The Mexican authorities had been driven out, or had
mitted to our army and navy; and the country was in
exclusive and firm possession of the United States, and gover
by its military authorities * * *." *Fleming* v. *Page*, su
p. 614.

§ 106 (1922); and Oppenheim, *International Law*, Vol. II, § 166 (6th ed., 1944).

Allied occupation of Germany after World War II had as its objective, not immediate or eventual annexation of Germany, but the rehabilitation of German political life. The quadripartite declaration announcing allied assumption of authority did "not effect the annexation of Germany."[3] The State Department, in reporting on the German occupation for 1945-46, stressed the efforts being made to restore German self-government on a democratic basis, noting that "[a] year after Potsdam (September 6, 1946) Secretary Byrnes advocated 'the early establishment of a provisional German government for Germany.'"[4] Thus, it is clear that German sovereignty has been preserved during the period of Allied occupation.

Petitioner cites *Brehm* v. *Acheson*, 90 F. Supp. 662 (S.D. Tex.) and *In re Riedner*, 94 F. Supp. 289 (E.D. Wis.), holding that, contrary to the views of authoritative international law treatises and of this Court, occupied Germany is not a foreign state. Those cases, and others holding similarly with respect to occupied Japan,[5] cannot be regarded as good law. More recent District Court cases have

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[3] Occupation of Germany, Policy and Progress, 1945-1946, Department of State Publication 2783, Plaintiff's Exhibit E (R. 24).

[4] *Ibid.*, 19.

[5] *Yamamoto* v. *Acheson*, 93 F. Supp. 346 (D. Ariz.); *Arikawa* v. *Acheson*, 83 F. Supp. 473 (S.D. Calif.); *Furuno* v. *Acheson*, 94 F. Supp. 381 (S.D. Calif.).

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held occupied Japan to be a foreign state,[6] and these were followed in *Acheson* v. *Kuniyuki*, 189 F. 2d 741 (C.A. 9), certiorari denied, 342 U.S. 942, the only Court of Appeals decision (prior to the instant case) involving the question of the status of occupied countries for the purpose of Section 401(e).

There is a real question, moreover, whether petitioner's contention that Germany was not a state is justiciable at all. This Court has long recognized that "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government." *Jones* v. *United States*, 137 U.S. 202, 212, and cases there cited. Hence, it may very well be conclusive here that the Department of State deems occupied Germany to be a "foreign state."[7]

3. The election of June 30, 1946, was a "political election" within the meaning of Section 401(e) of the Nationality Act of 1940. Voting in a foreign

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[6] *Kuwahara* v. *Acheson*, 96 F. Supp. 38 (S.D. Calif.); *Uyeno* v. *Acheson*, 96 F. Supp. 510 (W.D. Wash.). The "foreignness" of occupied territory has been recognized without question in cases arising under the Federal Tort Claims Act which prohibits actions against the United States based on claims arising in a foreign country. *Brewer* v. *United States*, 79 F. Supp. 405 (N.D. Calif.) (Okinawa); *Brunell* v. *United States*, 77 F. Supp. 68 (S.D. N.Y.) (Saipan).

[7] See Defendant's Exhibit 2, R. 9, a letter from the Legal Adviser of the State Department which refers to the "position of this Government that Germany did not pass out of existence as a state by virtue of the unconditional surrender and disappearance of the central government of that country."

election was made an act of expatriation because "an American national should" not "be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality."[8] The crucial word is "political," which is defined as follows:

> 1: Of or pertaining to polity, or polities, or the conduct of government, referring in the widest application to the judicial, executive and legislative branches; of or pertaining to or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state; * * *.[9]

It is incontrovertible that the process of adopting a constitution is "political" in the sense of pertaining to "the conduct of government" or "relating to the management of affairs of state." The significance for this process of the election in which petitioner voted is clearly brought out in the State Department publication, Occupation of Germany: Policy and Progress, 1945-1946[10]:

> (c) Constitutions. The United States has also taken the initiative in seeking to restore a constitutional basis for the political life of Germany. In each *Land* of the U.S. zone con-

[8] Hearings before House Committee on Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st sess., pp. 405, 490-491.

[9] Webster's New International Dictionary of the English Language (2d ed., unabridged, 1948).

[10] Reprinted as Plaintiff's Exhibit E, R. 16, at R. 22-23

stitutional assemblies, chosen by popular election on June 30, 1946, convened during the summer and drew up state constitutions on the basis of initial drafts prepared by special committees appointed by the three ministers-president. Vigorous controversy centered around such issues as the nature and powers of the executive, the existence and composition of a second chamber, religious influence in the schools, and the socialization of key industries. Military government gave a free hand to the assemblies except to prescribe that the documents insure democratic processes, the safeguarding of civil rights, and the supremacy of law. The three constitutions, as finally drafted by the assemblies and approved in October by OMGUS, embody the customary German pattern of parliamentary government through ministers-president subject to popular diets. Special stress is placed on guarantees of civil liberties, an independent judiciary, and popular checks both on administration and legislation.

The constitutions were presented to the electorates on November 24 and December 1, 1946. In all three *Länder* they were approved by substantial majorities. * * * As of January 1, 1947, the governments of the three *Länder* of the U.S. zone have rested upon a basis of democratic control through the mechanism of cabinets responsible to popularly elected diets and the role of military government in internal German affairs has been reduced to a minimum.

In view of the concrete achievement of the constitutional assembly elected in the election of June 30, 1946, that election cannot be said to have been a mere "straw vote or opinion poll or exercise in democracy" as petitioner contends (Pet. 16). Rather, as a vital step in the reestablishment of German self-government, it was the kind of foreign political activity participation in which Congress deemed inconsistent with American nationality.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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